Nos. 21,869 and 21,870

United States Court of Appeals

For the Ninth Circuit

VALLEY VISION, INC.,
Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA,
Respondents.

On Petitions to Review Decision and Orders of the Federal Communications Commission

REPLY BRIEF FOR PETITIONER

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Subject Index

Table of Authorities

Cases

Statutes

Other Authorities

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ARGUMENT

A. THE VENUE OF THIS PROCEEDING PROPERLY LIES IN THIS COURT

Much of the Government's brief is devoted to the argument that this Court possesses no jurisdiction to hear this appeal because, in the Government's view, jurisdiction is vested exclusively in the United States Court of Appeals for the District of Columbia Circuit. Although Petitioner has already discussed the matter of venue in its original brief, a few more words will be said here in response to the Government's contentions.

Although it is true, as the Government points out, that Section 402(b) of the Communications Act provides for appeal in the District of Columbia Circuit by "persons" against whom a cease and desist order has been issued, it does not follow that the Petitioner in the instant case is required to take its appeal in that Circuit. In the first place, although the Commission purported to have issued a cease and desist order against the Petitioner, that cease and desist order was a worthless nullity, because the Commission had no authority to issue it against Petitioner, a non-licensee who had never subjected itself to the Commission's jurisdiction. This is not a case where a valid and enforceable cease and desist order has been properly served on a Commission licensee, and said licensee is seeking to litigate the propriety of the procedures which led to the issuance of the Order.[1] Rather, Petitioner has shown that the Order issued by the Commission in this case was a legal nullity; it did not, in legal effect, ever issue, because the Commission had no authority to issue it. *Southwestern Cable Co. v. FCC and USA,* 378 F 2d 118 (1967).

Secondly, Petitioner is not a "person" upon whom a cease and desist order has been served, within the meaning of the statute. For as used in the statute, the term "person" means "licensee"—something which Petitioner is not.

That the term "person" was intended to refer only to licensees is clear from the statutory history of the

[1]Although, as Petitioner has pointed out in its brief, those procedures were grossly lacking in due process.

Communications Act, and from the interpretations placed on the Act by the Courts. The original language of Section 402 (b) of the Communications Act, as adopted in 1934, is reproduced in the Appendix to this Reply Brief. That language restricted the categories of appeals to be taken in the District of Columbia Circuit to three categories: namely, appeals by persons whose applications for construction permits or licenses had been denied, appeals by persons aggrieved by grant or denial of such applications, and radio operators whose licenses were denied. Thus, it was clear that the framers of the Act intended to restrict the cases to be heard in the District of Columbia Circuit to those cases involving the Commission's licensing functions. In fact, Senator Dill—one of the leading lights in the framing of the legislation—commented specifically on this point in the Senate Report as follows:

> "Where a licensee desires to appeal from orders of the Commission affecting his interest, but which he did not originate, he may file his appeal in the three-judge district court in the jurisdiction where he lives. In those cases where he has applied to the Commission for an order and desires to appeal from the Commission's action, he must come to Washington, D.C. to prosecute his appeal, just as he came to Washington, D.C. to ask for the order.
>
> "In fact, appeals from refusals of applications by the Commission could not be prosecuted in the federal district courts anyhow, and must be prosecuted in the courts of the District of Columbia.

> "Your committee believes that this appeal section is eminently fair. In nearly all cases in which the Commission makes an order affecting a licensee which the licensee did not seek, the Commission must go to the district court having jurisdiction of such licensee. Where an applicant or a licensee comes to the District of Columbia and applies for an order, he must take his appeal in the courts of the District of Columbia." *Senate Report No. 781,* 73rd Congress, 2nd Session, pages 9, 10. Submitted by Senator Dill of the Interstate Commerce Committee.

And as if to drive the point home, he added in remarks on the floor of the Senate that:

> "I desire to call attention to what I think is an important fact to consider in this appeal provision. Those owners of radio broadcasting stations living long distances from the District of Columbia should not be required to come to Washington to prosecute an appeal from a decision for which they were not responsible. When I say 'were not responsible' I mean a decision which was granted against them or affecting them when they did not bring the case into court . . . so we provide that where the decisions of the Commission are made in cases wherein the stations took no part in beginning the suits, appeal may be taken in the three-judge district courts in the jurisdictions where the stations are located. But in the case where the applicant for the license or the permit, or whatever it may be, comes to the Commission and asks for something to be done by the Commission, then if the Commission makes a decision from which he desires to appeal he must make his appeal in the courts

of the District of Columbia." 78 Cong. Rec. 8825-26. Cf. *Sen. Rep. No. 781,* 73rd Cong., 2d Sess., pp. 9-10, cited by the U.S. Supreme Court in *Scripps-Howard Radio v. FCC,* 316 U.S. 4, 8 (1942).

In 1952, the Congress amended Section 402 of the Communications Act to add Section 402(b)(7), which provides for appeals in the District of Columbia Circuit by persons against whom a cease and desist order had been issued. In so doing, however, Congress never intended to deviate from the established principal that only appeals from cases involving the Commission's *licensing* functions would have to be taken in D.C. The Senate Report on the Communications Act amendments, 1952, *Senate Report No. 44,* 82nd Congress, 1st Session, submitted January 25, 1951, by Mr. McFarland makes this crystal clear. It states, in relevant part, at page 11, that:

"Subsection (a) deals only with judicial review of Commission orders by specifically constituted three-judge courts. It substantially restates existing law with necessary clarification, and a provision is inserted which would give parties plaintiff, other than the Government, an option of venue for district court or in the United States District Court for the District of Columbia. *Subsections (b) through (j) deal with the subject of judicial review of decisions and orders of the Commission which are entered in the exercise of its radio-licensing functions.*

"Subsection (b) attempts a more precise and comprehensive definition of the jurisdiction of the

> United States Court of Appeals for the District of Columbia in cases appealed from the Commission. The language of this subsection, when considered in relation to that of subsection (a), *also would make clear that judicial review of all cases involving the exercise of the Commission's radio-licensing function power is limited to that Court.*" (Emphasis supplied.)

The House Report on the 1952 Communications Act amendments, submitted by Mr. Harris, reaffirms the same point. It states, at page 16, that:

> "In specifying, in Section 402 (b), the orders and decisions which may be reviewed only by the United States Court of Appeals for the District of Columbia, the committee amendment follows the *existing provisions of law rather closely,* the principal differences being such as are necessary to conform to amendments made by other sections of the committee amendment." (Emphasis supplied.)

The Government's brief makes much of the decision of the two judges[2] of the District of Columbia Circuit, dismissing an appeal filed by Petitioner in that Circuit, and expressing the "belief" that exclusive jurisdiction over this case rests in Washington. Aside from the fact that the panel's remarks were *obiter dicta* and are not binding on this Circuit, they also represent a marked departure from past practice in the District of Columbia Circuit and may well fail

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[2]There were three judges on the panel, but one did not participate.

to reflect the opinion of a majority of the Judges of that Circuit. For all of the reported cases in the District of Columbia Circuit have previously followed the intent of Congress that only appeals from cases involving the Commission's *licensing* functions must be taken there.[3] *Booth American Company v. FCC* and *Buckeye Cablevision, Inc. v. FCC* are not contrary to that general proposition. Those cases dealt only with the question of the Commission's general jurisdiction over CATV, and never reached the question of whether the Commission possessed the statutory power to issue cease and desist orders against non-licensees.

B. THE "CEASE AND DESIST" PROVISIONS OF SECTION 312(b) OF THE COMMUNICATIONS ACT WERE NEVER INTENDED TO APPLY TO NON-LICENSEES

The Commission's attempt to distinguish the case of *Regents v. Carroll* on the grounds that it was decided before Congress gave the Commission the power to issue cease and desist orders overlooks the legislative history, which makes it clear that the cease and desist order power was never intended to be exercised against anyone except Commission licensees. That history was set forth in detail in Petitioner's original

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[3]*E.g. Rhode Island Television Corporation v. FCC,* 320 F.2d 762 (D.C. Circuit 1963); *Tomah-Mauston Broadcasting Co., Inc. v. FCC,* 306 F.2d 811 (D.C. Circuit 1962); *Functional Music, Inc. v. FCC,* 274 F.2d 543 (D.C. Circuit 1958); *Jacksonville Journal Company v. FCC,* 246 F.2d 699 (D.C. Circuit 1957); and *O'Neill Broadcasting Company v. USA and FCC,* 241 F.2d 443 (D.C. Circuit 1956).

brief and will not be repeated here. Suffice to again point out that the Senate Report on Section 312(b) specifically stated that "The cease and desist action would apply to those cases where a *licensee* has (1) failed to operate substantially as set forth in his *license;* (2) failed to observe the restrictions of this Act or of a treaty ratified by the United States; and (3) violated or failed to observe any rule or requirement of the Commission authorized by this Act" (emphasis supplied).[4]

C. THE PROCEEDINGS BEFORE THE COMMISSION WERE GROSSLY UNFAIR AND ARBITRARY

Finally, a few more words should be said concerning the Commission's attempts to justify the arbitrary and grossly inadequate proceedings which it conducted before issuing the cease and desist order against the Petitioner.

At page 6 of its Brief, the Government points out correctly that the "Grade A Contour defines the area at the perimeter of which a good picture is received for 90% of the time at the best 70% of locations". If this be true (which it is) and if the location of the Grade A contour of the Sacramento stations determines whether the Petitioner complies or doesn't comply with the Commission's Rules (which it does), it would seem that the Commission would have been

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[4] *S.R. No. 44,* 82d Cong., 1st Sess. (1951). I *Pike and Fischer* RR 10:282.

very interested in finding out just where the Grade A contour of the Sacramento stations was located. But strangely, the Commission's Broadcast Bureau and Hearing Examiner seemed monumentally disinterested in that question. Although everybody admits that the "predicted" method of locating the contour is only an inaccurate "guestimate", the Commission authorities stubbornly refused to receive evidence preferred by Petitioner to show, by actual measurement, where the contour was really located.

Perhaps this was because the case was prosecuted by representatives of the Commission's Broadcast Bureau, which is concerned with the regulation of the interests of television stations and their owners, not CATV systems. Had representatives of the Commission's CATV Task Force been present, they might well have been more inclined to get at the real facts, instead of relying upon an admittedly incorrect estimate of the location of the contour, in order to reach a desired result.

D. CONCLUSION

In conclusion, there is nothing in the Government's Brief to warrant denial of the relief requested by Petitioner. The cease and desist order issued by the Commission should be vacated and set aside.

Dated, December 11, 1967.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LAUREN A. COLBY,
Attorney for Petitioner.

(Appendix Follows)

Appendix

Appendix

Original language of Sections 402(a) and 402(b) of the Communications Act of 1934:

"Proceedings to Enforce or Set Aside the Commission's Orders—Appeal in Certain Cases

"Sec. 402. (a) of the provisions of Title 28 of the United States Code, relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license), and such suits are authorized to be brought as provided in such Title 29.

"(b) An appeal may be taken, in the manner hereinafter provided, from decision of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

"(3) By any radio operator whose license has been suspended by the Commission."